

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Gateway Telecom LLC d/b/a)	
STRATUSWAVE COMMUNICATIONS)	
)	File Nos. 0002362083, 0002362089
Applications For New Educational Broadband)	
Service Stations on the A and B Group Channels)	
in Centerville, Ohio; and A and B Group Channels)	
in Arden, West Virginia)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 2007

Released: August 8, 2007

By the Commission:

I. INTRODUCTION

1. On October 25, 2005, Gateway Telecom LLC d/b/a StratusWave Communications (StratusWave) filed applications and accompanying requests for waiver for four vacant A-group and four vacant B group commercial Educational Broadband Service (EBS) channels in Centerville, Ohio¹ and Arden, West Virginia.² In those applications,³ StratusWave seeks waiver of: (a) the filing freeze that was imposed by the Commission on new EBS applications in the Commission's April 2003, *NPRM and MO&O* that proposed new technical rules and a new band plan for EBS and Broadband Radio Service (BRS) spectrum;⁴ (b) Section 27.1201(c)(3) of the Commission's Rules to permit StratusWave to hold licenses for EBS channels without holding a license or lease rights for at least four channels to be used in conjunction with the facilities proposed in the application;⁵ and (c) Section 1.913(b) of the Commission's

¹ Application, File No. 0002362083 (filed Oct. 25, 2005) (Centerville Application).

² Application, File No. 0002362089 (filed Oct. 25, 2005) (Arden Application).

³ The substance of each of StratusWave's requests for waiver is the same. The requests for waiver accompanying each of the applications shall be collectively referred to as the "Waiver Requests."

⁴ See Waiver Requests at 1. See also Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands. *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 6722, 6811 ¶ 226, 6825 ¶ 260 (2003) (*NPRM and MO&O*) (stating in relevant part that "[i]t is ordered that applications for new MDS or ITFS licenses, major modifications of MDS stations, or major changes to ITFS stations other than applications for license assignments or transfers of control WILL NOT BE ACCEPTED until further notice.")

⁵ See Waiver Requests at 1. Section 27.1201(c)(3) of the Commission's Rules stated in relevant part that "[t]o be licensed on EBS channels, a wireless cable applicant must hold a license or a lease, or must have filed an unopposed application for at least four BRS channels to be used in conjunction with the facilities proposed on the EBS frequencies." 47 C.F.R. § 27.1201(c)(3) (2005). We note that this rule and the other rules dealing with the "wireless cable" exception to the EBS eligibility rule were eliminated on July 19, 2006. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access,

(continued....)

rules to permit manual filing of the applications.⁶ For the reasons stated below, we grant the Waiver Requests with conditions designed to ensure that the spectrum is rapidly placed in use and that StratusWave meets its commitments to rapidly provide broadband service to rural West Virginia and Ohio. We also will issue StratusWave ten-year, non-renewable conditional authorizations that will require StratusWave to reduce or terminate service as needed to protect EBS operations when a new adjacent-channel or co-channel EBS licensee notifies StratusWave that it is ready to commence providing service within any portion of the geographic service areas covered by StratusWave's licenses. These conditions will ensure that we preserve the primarily educational nature of EBS while allowing StratusWave to meet the immediate needs of its rural service areas.

II. BACKGROUND

2. In developing regulatory policies in the 2500-2690 MHz band over the last several decades, the Commission has been cognizant of this band's vast potential to host a variety of services. In 1963, the Commission established the Instructional Television Fixed Service (ITFS) in the 2500-2690 MHz band,⁷ envisioning that it would be used for transmission of instructional material to accredited public and private schools, colleges, and universities for the formal education of students.⁸ In 1983, in response to the demand for additional spectrum for delivery of video entertainment programming to subscribers, the Commission re-allotted eight ITFS channels (the E and F channel blocks) and associated response channels for use by the Multipoint Distribution Service (MDS).⁹ The Commission determined that the ITFS spectrum was underutilized given that there were a substantial number of unused ITFS channels in many areas of the country.¹⁰ At the same time, in an effort to encourage more intensive use of

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Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Third Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5754-5756 ¶¶ 360-366 (2006). However, the Commission stated that any pre-existing requests for spectrum under the wireless cable exception would be grandfathered. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165, 14292-93 ¶¶ 347-350 (2004) (*BRS/EBS R&O and FNPRM*). Since StratusWave's applications were pending at the time the rules were eliminated, we will consider its request using the rules in effect at the time it filed.

⁶ See Waiver Requests at 1. Section 1.913(b) of the Commission's Rules states in relevant part that "all applications and other filings using FCC Forms 601 through 608 or associated schedules must be filed electronically in accordance with the electronic filing instructions provided by ULS." 47 C.F.R. § 1.913(b).

⁷ See Educational Television, Docket No. 14744, *Report and Order*, 39 FCC 846 (1963) (*MDS R&O*), *recon. denied*, 39 FCC 873 (1964) (*ETV Decision*).

⁸ See Amendment of the Commission's Rules With Regard to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service; and Applications for an Experimental Station and Establishment of Multi-Channel Systems, *Report and Order*, 48 Fed. Reg. 33873, 33875 ¶ 9 (1983) (*1983 R&O*) (*citing ETV Decision*, 39 FCC 846, 853 ¶ 25).

⁹ See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, Gen Docket No. 80-112 and CC Docket No. 80-116, *Report and Order*, 94 FCC 2d 1203 (1983) (*First Leasing Decision*). The Commission renamed the MDS and ITFS as the "Broadband Radio Service" and "Educational Broadband Service," respectively, to better reflect the new services anticipated for this band. See *BRS/EBS R&O and FNPRM*, 19 FCC Rcd at 14182, 14227 ¶¶ 6, 164.

¹⁰ See *First Leasing Decision*, 94 FCC Rcd at 1206-07 ¶ 4.

the spectrum and to help ITFS licensees generate needed revenue, the Commission began to relax use restrictions to permit ITFS licensees to lease excess capacity on their facilities to commercial entities.¹¹

3. On October 25, 1991, the Commission adopted a proposal to permit use of available ITFS channels by wireless cable entities.¹² In order to ensure that wireless cable use did not have a negative impact upon ITFS, the Commission established a series of requirements that must be met before ITFS channels could be used for wireless cable use.¹³ First, an applicant seeking to use this exception must hold, or have an unopposed application for, at least four MDS channels that would be used in conjunction with the channels that are the subject of the application.¹⁴ The Commission concluded that this requirement would help “avoid the preemption of new ITFS services by wireless cable applications that are unlikely to result in a viable wireless cable service.”¹⁵ Second, in order for commercial operators to take advantage of ITFS frequencies, at least eight ITFS channels must remain available in the community.¹⁶ Also, there can be no co-channel ITFS station within 50 miles of the proposed system.¹⁷ If an ITFS applicant applies at the same time as the commercial operator, the ITFS application will be granted if the applicant is qualified.¹⁸

4. In March 1996, the Commission completed an auction of MDS licenses for unused spectrum in each of 493 BTAs and BTA-like areas.¹⁹ The Commission granted the BTA authorization the exclusive right to apply for available ITFS frequencies on a commercial basis within the BTA.²⁰

5. In April 2003, the Commission proposed new technical rules and a new band plan for EBS and BRS spectrum and at the same time imposed a filing freeze on new EBS applications.²¹ On June 10, 2004, the Commission adopted new rules that initiated a fundamental restructuring of the 2500-2690 MHz band²² in order to provide both existing EBS and BRS licensees and potential new entrants greater flexibility in order to encourage the highest and best use of spectrum domestically and internationally. Among other things, the Commission eliminated the wireless cable exception to the EBS eligibility rules for those markets that complete the transition to the new band plan.²³ The Commission also sought

¹¹ *Id.*

¹² See Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Cable Television Relay Service, Gen. Docket No. 90-54, *Second Report and Order*, 6 FCC Rcd 6792, 6793, 6801-06 ¶¶ 4, 42-58 (1991) (*Second R&O*); see also *Second R&O* at Appendix C; 47 C.F.R. § 74.990 (1991).

¹³ See former 47 C.F.R. § 74.990.

¹⁴ See former 47 C.F.R. § 74.990.

¹⁵ *Second Report and Order*, 6 FCC Rcd at 6804 ¶ 54.

¹⁶ See former 47 C.F.R. § 74.990(a).

¹⁷ *Id.*

¹⁸ See former 47 C.F.R. § 74.990(e).

¹⁹ FCC Fact Sheet, *Auction 6: Multipoint/Multichannel Distribution Services*, accessible on the Commission's web site at <http://wireless.fcc.gov/auctions/06/factsheet.html>.

²⁰ See *BTA Auction Order*, 10 FCC Rcd at 9612 ¶ 41.

²¹ See *NPRM and MO&O*, 18 FCC Rcd at 6811 ¶ 226, 6825 ¶ 260.

²² See generally *BRS/EBS R&O and FNPRM*.

²³ See *BRS/EBS R&O and FNPRM*, 19 FCC Rcd at 14293 ¶ 349.

comment on whether to eliminate the wireless cable exception to the EBS eligibility rules in markets that have not transitioned to the new BRS/EBS band plan.²⁴

6. StratusWave was formed in 1998 and is a facilities-based provider of local telephone service, long distance telephone service and Internet services (dial-up and broadband) to residential and business customers in the northern panhandle of West Virginia.²⁵ StratusWave currently serves over 3,000 dial-up customers and over 500 broadband residential and business customers.²⁶ Additionally, StratusWave has over 1,300 business telephone on-net local lines and more than 500 resale local residential lines.²⁷

7. In 1998, StratusWave was the successful bidder for Local Multipoint Distribution Service (LMDS) spectrum (Auction 17) for the Fairmont, Morgantown, Steubenville and Wheeling BTAs and to date has paid \$276,095 in auction fees.²⁸ StratusWave began its wireless operations in 2000 by deploying LMDS in Wheeling, West Virginia to deliver competitive local telephone and broadband service.²⁹ StratusWave explains that it continues to use its LMDS network to deliver broadband and backup voice services.³⁰ StratusWave, however, asserts the LMDS technology available then was not reliable enough to carry competitive voice services and/or broadband services.³¹

8. In 2004, StratusWave applied for and received \$555,000 in Rural Utilities Service (RUS) grants to provide broadband service to the communities of Bethany, Middlebourne and Pine Grove, West Virginia.³² StratusWave avers that in order to provide these services it has made additional significant investments in unlicensed wireless technologies operating at reduced power levels that limit service areas and increase deployment costs.³³ StratusWave has also applied to the RUS for additional grants to provide broadband service to communities located in the service areas proposed by the applications captioned above.³⁴ StratusWave explains that it expanded its network to surrounding communities and that residential customers who had no alternative but to pay long distance charges in order to use dial-up Internet now have access to affordable high-speed Internet as well as unlicensed wireless broadband services in certain rural areas.³⁵ StratusWave has 23 base stations in northern West Virginia and neighboring Ohio from which it provides telecommunications service on LMDS and/or unlicensed frequencies.³⁶ StratusWave asserts that these sites could be used in connection with its proposed 2.5 GHz network, which would allow StratusWave to quickly and efficiently deploy EBS service to the public.³⁷

²⁴ See *id.* at 14293 ¶ 350.

²⁵ Waiver Requests at 2.

²⁶ Waiver Requests at 2-3.

²⁷ Waiver Requests at 2-3.

²⁸ Waiver Requests at 2.

²⁹ Waiver Requests at 2.

³⁰ Waiver Requests at 2.

³¹ Waiver Requests at 2.

³² Waiver Requests at 2.

³³ Waiver Requests at 2.

³⁴ Waiver Requests at 2.

³⁵ Waiver Requests at 2.

³⁶ Waiver Requests at 3.

³⁷ Waiver Requests at 3.

9. StratusWave's applications were listed on public notice as accepted for filing on November 9, 2005.³⁸ No petitions to deny or other oppositions were filed. Comments in support of StratusWave's efforts to bring wireless broadband service to rural communities in West Virginia were submitted by the Honorable Allan B. Mollohan, Member of Congress.³⁹ Comments in support of StratusWave's FCC applications were filed by educational institutions,⁴⁰ public safety entities,⁴¹ and a hospital.⁴² Supporting educators argue that granting the Waiver Requests will provide students, teachers and administrators with wireless access to broadband services.⁴³ Educators note that a large number of the families in the Cameron, West Virginia and Wheeling, West Virginia school districts do not have broadband Internet access and as such welcome StratusWave's plans to provide wireless broadband service.⁴⁴ Commenters also note that StratusWave currently operates, with funds StratusWave received from the RUS, community centers in Cameron, West Virginia and Middlebourne, West Virginia, to deploy internet services.⁴⁵ The Ohio County Sheriff's Department, the City of Cameron, and the West Liberty, West Virginia Police Department support StratusWave's plans to build and operate a new wireless broadband system because StratusWave's plans will provide these municipalities with redundancy in their communications infrastructure via a facilities-based wireless provider.⁴⁶ The municipalities stress that redundancy in their communications infrastructure is important in the event of a catastrophic event because redundancy would improve the chances that at least one communications system will be available for vital communications needs.⁴⁷

³⁸ See Wireless Telecommunications Market-Based Applications Accepted for Filing, Report No. 2303, *Public Notice* (rel. Nov. 9, 2005) at 2.

³⁹ See Waiver Requests at Appendix 2: Letter from Alan B. Mollohan, Member of Congress to Libby Reasbeck, StratusWave Communications (May 24, 2005) (Mollohan Letter).

⁴⁰ See Waiver Requests at Appendix 3: Letter from Larry Dalesio, Principal, Cameron Elementary School to Marlene H. Dortch, Secretary, Federal Communications Commission (September 19, 2005) (Cameron Elementary Letter); Letter from Marilyn McWhorter, Principal, Cameron High School to Marlene H. Dortch, Secretary, Federal Communications Commission (Cameron High Letter); Letter from Sandy M. Weese, Principal, Tyler Consolidated High School to Marlene H. Dortch, Secretary, Federal Communications Commission (September 16, 2005) (Tyler High Letter); Letter from Ed Stombock, Principal, Tyler Consolidated Middle School to Marlene H. Dortch, Secretary, Federal Communications Commission (September 16, 2005) (Tyler Middle Letter); Letter from Dr. Judy Stechly, Principal Wheeling Catholic School to Marlene H. Dortch, Secretary, Federal Communications Commission (September 19, 2005) (Wheeling Catholic Letter).

⁴¹ See Waiver Requests at Appendix 4: Letter from Thomas F. Burgoyne, Sheriff, Ohio County, West Virginia to Marlene H. Dortch, Secretary, Federal Communications Commission (September 15, 2005) (Ohio County Letter); Letter from Betty Scott, Mayor and Acting Police Chief, City of Cameron, West Virginia to Marlene H. Dortch, Secretary, Federal Communications Commission (City of Cameron Letter); Letter from Nelson Croft, Chief of Police, West Liberty, West Virginia to Marlene H. Dortch, Secretary, Federal Communications Commission (September 19, 2005) (West Liberty Letter).

⁴² See Waiver Requests at Appendix 5: Letter from Dr. David J. Shaffer, Harrison Community Hospital to Marlene H. Dortch, Secretary, Federal Communications Commission (September 14, 2005) (Harrison Community Hospital Letter).

⁴³ Cameron Elementary Letter; Cameron High Letter; Tyler High Letter; Tyler Middle Letter; Wheeling Catholic Letter.

⁴⁴ Cameron Elementary Letter; Cameron High Letter; Wheeling Catholic Letter.

⁴⁵ Cameron Elementary Letter; Cameron High Letter; City of Cameron Letter; Tyler High Letter; Tyler Middle Letter.

⁴⁶ Ohio County Letter; City of Cameron Letter. West Liberty Letter.

⁴⁷ Ohio County Letter; City of Cameron Letter. West Liberty Letter.

III. DISCUSSION

A. Waiver Requests

10. StratusWave seeks waiver of: (a) Section 1.913(b) of the Commission's rules to permit manual filing of the applications;⁴⁸ (b) Section 27.1201(c)(3) of the Commission's Rules to permit StratusWave to hold licenses for EBS channels without holding a license or lease rights for at least four channels to be used in conjunction with the facilities proposed in the application;⁴⁹ and (c) the filing freeze that was imposed by the Commission on new EBS applications in the Commission's April 2003 *NPRM and MO&O*.⁵⁰ The Commission may grant a request for a waiver if it is shown that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁵¹ In this case, we conclude that StratusWave has justified its requested waivers because a series of unique factors, taken together, lead us to conclude that it would be contrary to the public interest to deny StratusWave access to these frequencies.

11. First, we grant StratusWave a waiver of the electronic filing requirement contained in Section 1.913(b) of the Commission's Rules. A waiver⁵² to permit manual filing of the applications is necessary because the Commission's electronic Universal Licensing System (ULS) is not currently configured to accept applications such as the ones submitted by StratusWave. We therefore conclude that application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest because it would be unfair to reject an application for failure to file electronically when electronic filing is not possible.

12. Second, we consider StratusWave's request for waiver of Section 27.1201(c)(3) of the Commission's Rules. That rule states, in relevant part, that "[t]o be licensed on EBS channels, a wireless cable applicant must hold a license or a lease, or must have filed an unopposed application for at least four BRS channels to be used in conjunction with the facilities proposed on the EBS frequencies." Under current policy, the BRS BTA authorization holder has the exclusive right to apply for these commercial EBS channels.⁵³ In the instant case, however, there are no BRS or EBS licensees in the five BTAs encompassing north central West Virginia and the upper Ohio River Valley.⁵⁴ There are no incumbent BRS licensees because the licensees failed to renew their licenses, the licenses were cancelled for failure to timely construct or seek extension, or no license was ever issued. Additionally, TV Communications Network, Inc. (TVCN), the winner of the BTA auction for each of the five BTAs encompassing north central West Virginia and the upper Ohio River Valley,⁵⁵ failed to make timely installment payments and

⁴⁸ See Waiver Requests at 1 and 47 C.F.R. § 1.913(b).

⁴⁹ See Waiver Requests at 1 and 47 C.F.R. § 27.1201(c)(3) (2005).

⁵⁰ See Waiver Requests at 1. See also *NPRM and MO&O*, 18 FCC Rcd at 6811 ¶ 226, 6825 ¶ 260.

⁵¹ 47 C.F.R. § 1.925(b)(3).

⁵² See 47 C.F.R. § 1.913(b).

⁵³ *BTA Auction Order*, 10 FCC Rcd at 9612 ¶ 41.

⁵⁴ Waiver Request at 7 and Waiver Request at Appendix 1. The BTAs, portions of which are within the GSAs proposed in StratusWave's applications, are as follows: B082 Clarksburg-Elkins, WV, B137 Fairmont, WV, B306 Morgantown, WV, B 431 Steubenville/Weirton, OH/WV, and B471 Wheeling, WV.

⁵⁵ *Id.*

its authorizations automatically cancelled.⁵⁶ Moreover, no EBS licensees have sought waiver of the filing freeze to provide service.⁵⁷

13. Because there is no BRS licensee within the area, there is no eligible party under Section 27.1201(c)(3) of the Commission's Rules to apply for the vacant EBS frequencies in the BTAs enumerated above that would otherwise be permitted under Section 27.1201(c)(1) of the Commission's Rules⁵⁸ and pursuant to the rights granted in the *BTA Auction Order*.⁵⁹ Therefore, there is no current licensee that would be negatively impacted by granting a waiver to StratusWave. We concur with StratusWave that if a waiver is denied, the BRS and EBS frequencies will lay fallow until the Commission makes the spectrum available through auctions or other means.⁶⁰

14. We anticipate that grant of the Waiver Requests will result in substantial benefits for the people in StratusWave's geographic service areas, which cover a substantial portion of rural northern West Virginia and the Ohio River Valley. Conversely, denial in this instance would harm the public because applying the freeze would limit their ability to receive expanded competitive broadband services. We note that West Virginia has one of the lowest rates of availability of broadband services in the nation. There were 155,397 total high-speed lines in service in West Virginia as of December 31, 2004.⁶¹ This represents 0.4% of the 37.8 million total high-speed lines in service in the entire United States, and West Virginia ranks 41st out of the 50 states in deployment of high-speed lines.⁶² Twelve percent of West Virginia's zip codes had no broadband providers at the end of 2004, versus only five percent of zip codes nationwide.⁶³ Of the zip codes in West Virginia with high-speed lines in service, nearly 40 percent of those had only one provider, and 66 percent had one or two providers.⁶⁴ Educators note that "[a] large number of families in our district do not have broadband internet access."⁶⁵

15. On the other hand, we have substantial concerns about making these frequencies permanently unavailable to educators. While we have an unusual absence of any EBS stations or expressed interest from educational entities in this area, we anticipate that our recent rule changes will

⁵⁶ TVCN's request for waiver and reinstatement of the licenses was denied on January 29, 2007. See TV Communications Network, Inc., *Order*, 22 FCC Rcd 1397 (WTB 2007). TVCN filed an application for review on February 28, 2007, which is pending.

⁵⁷ Waiver Requests at 10.

⁵⁸ Section 27.1201(c)(1) of the Commission's Rules stated in relevant part that "a wireless cable entity may be licensed on EBS frequencies in areas where at least eight other EBS channels remain available in the community for future EBS use. Channels will be considered available for future EBS use if there are no co-channel operators or applicants within 80.5 km (50 miles) of the transmitter site of the proposed wireless cable operation and if the transmitter site remains available for use at reasonable terms by new EBS applicants on those channels within three years of commencing operation." 47 C.F.R. § 27.1201(c)(1) (2005).

⁵⁹ See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Report and Order*, 10 FCC Rcd 9589, 9612 ¶ 41 (1995) (*BTA Auction Order*).

⁶⁰ See Waiver Requests at 7.

⁶¹ Federal Communications Commission Releases Data on High-Speed Services for Internet Access, *News Release* (rel. Jul. 7, 2005) at Table 8 (*High Speed Services Report*).

⁶² *Id.*

⁶³ *Id.* at Table 13.

⁶⁴ *Id.*

⁶⁵ Cameron High Letter; Wheeling Catholic Letter.

substantially increase the demand for EBS frequencies. The Commission has affirmed that “the public interest favors preserving this spectrum for licensing to [educators] and that doing so will further the educational objectives that led to the establishment of [EBS].”⁶⁶ While grant of the above-captioned applications will still leave 12 EBS channels that will remain available for licensing in the future, we cannot conclude, based on the record before us, that 12 channels alone will be sufficient to meet the future demand of educators for EBS spectrum.

16. Based upon our evaluation of the record before us, we conclude that StratusWave has demonstrated that application of Section 27.1201(c)(3) of the Commission’s Rules would be inequitable, unduly burdensome and contrary to the public interest. We believe it is appropriate to issue ten-year, non-renewable authorizations to StratusWave subject to the condition that StratusWave must either reduce or terminate service as needed to accommodate a new EBS co-channel or adjacent-channel licensee when that EBS licensee is ready to commence service within any portion of StratusWave’s geographic service areas. Our decision to waive the rule and issue StratusWave authorizations is based upon the critical need of residents in the service areas for broadband service and upon the fact that local educators support StratusWave’s Waiver Requests. We do not believe, however, that issuing StratusWave permanent authorizations would be consistent with the underlying educational purposes of EBS. Rather, we find that granting StratusWave ten-year, non-renewable conditional authorizations would allow StratusWave to meet the immediate needs of consumers while preserving the primarily educational purposes of EBS. We believe that ten-year, non-renewable conditional authorizations would provide an incentive to StratusWave to build out its network, while permitting the Commission to make that spectrum available at a time when we anticipate that many of the 2.5 GHz markets will have completed their transition to a new band plan. Furthermore, once a new co-channel or adjacent-channel EBS licensee informs StratusWave that it is ready to commence service within any portion of StratusWave’s geographic service areas, we will require StratusWave to reduce or terminate service as necessary to protect the operations of the EBS licensee in areas where their footprints overlap or interference may arise.⁶⁷ Once an educational entity is ready to commence service within any portion of StratusWave’s geographic service areas on a co-channel or adjacent channel basis, we believe it is appropriate to have the spectrum revert to its primary educational purposes.⁶⁸ If StratusWave is correct, however, and there is no educational demand in rural West Virginia or Ohio, we would allow StratusWave to continue operation until such demand exists or until its ten-year license term expires.

17. StratusWave also requests a waiver of the Commission’s filing freeze with respect to applications for new EBS licenses. In April 2003, the Commission determined that applications for new MDS or ITFS licenses, major modifications of MDS stations, or major changes to ITFS stations other than applications for license assignments or transfers of control would not be accepted until further notice. The freeze was instituted in order to permit the orderly and effective resolution of issues in the BRS/EBS proceeding.⁶⁹ In August 2003, the Commission modified the freeze by permitting the filing of

⁶⁶ See *BRS/EBS R&O and FNPRM*, 19 FCC Rcd at 14222 ¶ 152.

⁶⁷ Any new EBS co-channel or adjacent-channel licensee that is ready to commence service within StratusWave’s geographic service areas will be required to provide StratusWave with the location, power, and antenna information of its proposed base stations, the proposed area of operation of any user stations, and such other information as StratusWave may need to determine any changes StratusWave must make to its operations to prevent interference to such EBS licensee. Within 30 days after receiving such notice, StratusWave shall reduce or terminate service as needed in order to comply with Sections 27.53(l), 27.55(a)(4), and 27.1221 of the Commission’s Rules with respect to the area of operation identified by the new EBS licensee. At the end of the 30-day period, the EBS licensee may commence service as proposed in its notification to StratusWave.

⁶⁸ Subject to compliance with the educational and programming requirements in our rules, any new educational licensee and StratusWave would be free to enter into an excess capacity leasing arrangement.

⁶⁹ See *NPRM and MO&O*, 18 FCC Rcd at 6825 ¶ 260.

applications for new BRS licenses and major modifications of those licenses.⁷⁰ The Commission also permitted the filing of applications for major modifications of EBS licenses, but retained the filing freeze with respect to applications for new EBS licenses.⁷¹ The Commission stated that the “purpose [of the freeze] was to prevent further construction that might be inconsistent with rules and policies that [it] may later adopt for the band [and therefore was] concerned that unconstrained investment in interim technology and systems could generate resistance to the adoption of advanced-system rules, if after subsequent analysis [it] were to conclude that the interim technologies involved are not consistent with necessary rule changes.”⁷² In altering the freeze, the Commission explained that “several MDS/ITFS operators were well underway with serious efforts to deploy two-way, if not fully mobile, Internet access services when the MO&O was adopted [and that the] freeze action may have disrupted those plans and brought those efforts to a halt.”⁷³ The Commission, however, reasoned “that continuing the freeze on applications for new ITFS stations should not disrupt existing business plans.”⁷⁴

18. We recently granted a waiver of the freeze on new EBS station applications to allow an operator to deploy its services in the 2.5 GHz band.⁷⁵ In *Choice*, the applicant, a commercial BRS operator, sought a waiver of the freeze in order to apply for vacant EBS channels in St. Thomas, Virgin Islands in order to obtain additional spectrum for competitive purposes.⁷⁶ In the instant case, as was the case in *Choice*, however “sympathetic [as we are] to the competitive business concerns raised by [StratusWave], these concerns, standing alone, do not rise to the legal level necessary to meet our waiver standard.”⁷⁷

19. On the other hand, as was the case in *Choice*, we believe grant of the Waiver Requests “has the immediate potential to reap substantial benefits for the consumers of [rural northern West Virginia and the upper Ohio River Valley].”⁷⁸ Broadband services, especially in rural areas of West Virginia are largely unavailable.⁷⁹ According to the Wireline Competition Bureau’s July 2005 Report, 12% of the zip codes in West Virginia do not have high-speed service lines at all, compared to the national average of 5%, and 34 % of the zip codes in West Virginia only have one provider compared to the national average of 12%.⁸⁰ Additionally, a report commissioned by the West Virginia Development Office showed the state lags behind the national average in broadband availability.⁸¹ According to a survey conducted in the *Final Report*, “[a]pproximately 50% of the residences surveyed have some form

⁷⁰ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands. *Second Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 16848 (2003) (*Second MO&O*).

⁷¹ *Id.*

⁷² See *id.* at 16851 ¶ 6.

⁷³ See *id.* at 16851 ¶ 8.

⁷⁴ See *id.* at 16851-52 ¶ 10.

⁷⁵ See *Choice Communications LLC*, *Memorandum Opinion and Order*, 20 FCC Rcd 10906 (WTB 2005) (*Choice*).

⁷⁶ *Id.*

⁷⁷ *Id.* at 10911 ¶ 14.

⁷⁸ *Id.* at 10911 ¶ 15.

⁷⁹ Waiver Requests at 4, 6.

⁸⁰ See *High-Speed Services Report* at Table 13.

⁸¹ Waiver Requests at 4 and Appendix 7 (citing The Residential and Commercial Benefits of Rural Broadband: Evidence from Central Appalachia, prepared by the Marshall University Center for Business and Economic Research on behalf of the West Virginia Development Office, council for Community and Economic Development (July 2005) (*Final Report*)).

of Internet access and of those households that do subscribe to Internet services 42% do so via broadband. Both figures are below the national average of 66% and 51% respectively.”⁸² The *Final Report* also assesses the availability of broadband across different kinds of markets, finding the following:

In most large urban markets, each competing technology is available to both business and residential customers, sometimes from a variety of competing sellers. Most other metropolitan populations have access to, at least, one of the available broadband technologies. However, in the very rural areas, where population densities are notably low, broadband access is often nonexistent. This is, in fact the case for a measurable portion of West Virginia’s population.⁸³

20. We conclude that StratusWave has justified a waiver of the filing freeze under the second prong of the waiver standard because it has shown that applying the filing freeze would be inequitable, unduly burdensome and contrary to the public interest. In revising the rules and establishing BRS and EBS, the Commission noted that one of its primary goals was “to encourage the provision of new technologies and services to the public.”⁸⁴ Thus, in the instant case, waiving the filing freeze and Sections 27.1201(c)(3) and 1.913(b) of the Commission’s Rules would increase the availability of competitive broadband services to consumers in north central West Virginia and the upper Ohio River Valley. StratusWave has no reasonable alternative but to apply for these waivers because there is no BTA authorization holder or BRS licensee eligible under Section 27.1201(c)(3) of the Commission’s Rules to apply for the vacant EBS frequencies that would otherwise be permitted under Section 27.1201(c)(1) of the Commission’s Rules and pursuant to the rights granted in the *BTA Auction Order*.⁸⁵

21. Given the limited availability of broadband services in rural areas of West Virginia and the Ohio River Valley, grant of the waiver of the freeze and Sections 27.1201(c)(3) and 1.913(b) of the Commission’s Rules is in the public interest because it will give StratusWave the spectrum it requires to offer additional competitive broadband services to the consumers in those areas. Moreover, grant of the Waiver Requests furthers the Commission’s goal of providing all Americans with access to ubiquitous wireless broadband connections, regardless of their location.⁸⁶ This is particularly true in the instant case given that large areas of West Virginia, particularly rural areas where StratusWave plans to provide service, do not have any broadband access at all, or have only one provider offering such service.

22. We note that this case is different from *Choice* because StratusWave is not a current licensee in the 2.5 GHz band. Furthermore, in eliminating the wireless cable exception to the EBS eligibility rule post-transition, the Commission noted, “[g]iven that EBS-eligible licensees have not been able to apply for new stations in this band since 1995, we believe the better action is to restrict access to ITFS frequencies after the transition to educational institutions and non-profit educational organizations.”⁸⁷ In the instant case, two factors lead us to conclude that waiving the filing freeze and Sections 27.1201(c)(3) and 1.913(b) of the Commission’s Rules would not harm educational entities that

⁸² *Id.* (citing *Final Report* at 5).

⁸³ *Id.* at 5 (citing *Final Report* at 9 and Figure 2 and map at Waiver Requests, Appendix 1). StratusWave’s applications seek authority to provide broadband service to these areas, as well as areas within zip codes where no broadband service exists.

⁸⁴ *BRS/EBS R&O & FNPRM*, 19 FCC Rcd at 14165-66 ¶ 2 (citing 47 U.S.C. §§ 157(a), 309(j)(4)(C)(iii)).

⁸⁵ See *BTA Auction Order*, 10 FCC Rcd at 9612 ¶ 41.

⁸⁶ FCC Strategic Plan 2006-2011 at 5. In turn, this goal is based upon the statutory requirement that the Commission “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” Telecommunications Act of 1996, P.L. 104-104, Section 706(a),.

⁸⁷ *BRS/EBS R&O and FNPRM*, 19 FCC Rcd at 14293 ¶ 349.

wished to access EBS spectrum. First, StratusWave's request has the support of educators.⁸⁸ Second, because StratusWave's authorization will either terminate at the end of its ten-year license term, or StratusWave will be required to reduce or terminate service to protect a new EBS licensee's operations within 30 days after the licensee notifies StratusWave that it is ready to commence service within any portion of StratusWave's geographic service areas, any future educational entities that wish to access the spectrum would not be unduly limited by StratusWave's licenses.

23. Finally, we recognize that granting these waivers will result in StratusWave obtaining valuable spectrum. While we believe that there are substantial public interest benefits to granting a waiver, we believe it is appropriate to place conditions on the waiver grant to ensure that the anticipated public interest benefits materialize and to avoid StratusWave receiving a windfall without delivering the promised service. First, given the lack of broadband alternatives in the areas in question, we believe it is appropriate to require StratusWave to build out on an accelerated schedule. While BRS and EBS licensees are currently required to provide substantial service by May 1, 2011,⁸⁹ we will require StratusWave to demonstrate substantial service by the end of 2009. We find such a requirement to be an appropriate means of ensuring that service is rapidly provided to StratusWave's service areas. Second, StratusWave will not be allowed to assign or transfer the licenses until it demonstrates it has provided substantial service. Given that StratusWave could reap a substantial windfall if it sold the licenses without providing service, we believe it is important to ensure that StratusWave meets its commitments to provide substantial service first. We therefore will impose a condition prohibiting StratusWave from transferring or assigning the licenses (except for *pro forma* transfers or assignments) until the Commission has accepted its substantial service showing. Third, as noted above, StratusWave may not renew these licenses. Finally, StratusWave will be required to protect a new adjacent-channel or co-channel EBS licensee within 30 days after the licensee informs StratusWave that it is ready to commence service within any portion of StratusWave's geographic service areas.

IV. CONCLUSION AND ORDERING CLAUSES

24. For the reasons discussed above, we grant StratusWave's requests for (1) a waiver of: the filing freeze that was imposed by the Commission on new EBS applications in the Commission's April 2003, *NPRM and MO&O*; (2) Section 27.1201(c)(3) of the Commission's Rules, and (3) Section 1.913(b) of the Commission's Rules. We also impose appropriate conditions to ensure that StratusWave provides the service it proposes and to preserve the primary educational purposes of EBS. We also direct the Wireless Telecommunications Bureau to process StratusWave's Applications in accordance with the requirements set forth in this *Memorandum Opinion and Order* and the Commission's rules.

25. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925(b)(3) of the Commission's Rules, 47 C.F.R. § 1.925(b)(3), that the waiver requests filed by Gateway Telecom LLC d/b/a StratusWave Communications on October 25, 2005, in connection with File Nos. 0002362083 and 0002362089 ARE GRANTED, subject to the conditions noted below.

26. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309 that the licensing staff of the Broadband Division, Wireless Telecommunications Bureau SHALL PROCESS the captioned applications in accordance with the requirements set forth in this *Memorandum Opinion and Order* and the Commission's Rules.

⁸⁸ See Waiver Requests at Appendix 3

⁸⁹ 47 C.F.R. § 27.14(e).

27. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309 that the following conditions SHALL BE IMPOSED on any authorizations issued to StratusWave as a result of the applications it has filed:

StratusWave shall make a showing of substantial service by December 31, 2009. If StratusWave fails to make a showing of substantial service by December 31, 2009, this authorization shall be forfeited pursuant to Section 27.14(a) of the Commission's Rules.

StratusWave shall not assign or transfer this license (other than a *pro forma* assignment or transfer) until the Commission has accepted a demonstration of substantial service for this authorization.

This authorization may not be renewed.

Within 30 days after receiving notification from a new co-channel or adjacent-channel EBS licensee that such EBS licensee wishes to commence service within any portion of the geographic service area of this authorization to StratusWave (such notification including the location, power, and antenna information of the EBS licensee's proposed base stations, the proposed area of operation of any user stations, and such other information as StratusWave may need to determine any changes StratusWave must make to its operations), StratusWave shall reduce or terminate service as necessary to comply with Sections 27.53(l), 27.55(a)(4), and 27.1221 of the Commission's Rules with respect to the operations identified by the EBS licensee.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary